IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

Criminal Action No. 09-CR-331 (FJS)

v.

NOEL KENT FARROW,

Defendant.

****

SENTENCING MEMORANDUM OF THE UNITED STATES

I. INTRODUCTION

The United States submits this Sentencing Memorandum in advance of the sentencing hearing currently scheduled for October 23, 2009, in the above-captioned case. On June 8, 2009, pursuant to an Agreement between the parties, NOEL KENT FARROW, entered a plea of guilty to a one-count information, charging him with Possession with Intent to Distribute and Distribution of Cocaine in violation of 21 U.S.C. § 841(a)(1), 841(b)(1)(B). The United States submits this Memorandum pursuant to the Uniform Presentence Order issued by the Court on June 8, 2009, in anticipation of sentencing, which is scheduled for October 23, 2009.

This Memorandum addresses the Presentence Investigation Report and any objections or arguments relating to sentencing made by the Defendant to date. If the Court is considering a departure from the applicable U.S. Sentencing Guidelines range on a ground not previously identified by the parties or in the Presentence Investigation Report, the parties are entitled to notice and an opportunity to respond. *See* Fed R. Crim. P. 32(i)(1)(c), 32 (h).

II. PLEA AGREEMENT

Pursuant to the Plea Agreements executed by the parties in both cases, the following stipulations relate to the calculation of the Sentencing Guidelines range:

1. The defendant has agreed to a stipulated statement of facts. (¶ 5.)
2. The defendant has agreed to waive his right to appeal or collaterally attack his conviction or any sentence in the event she receives a sentence of 137 months or less. (¶ 15);
3. The government has reserved the right to recommend a specific sentence within the Guideline range determined by the Court and to oppose any motion for a downward departure. (¶ 8.)
4. The government has reserved the right to advise the sentence Court and the Probation Office of any information in aggravation or mitigation of sentencing. (¶ 8.)
5. The government will recommend a 3-level downward adjustment based on the defendant's acceptance of responsibility. (¶ 9.)

III. PRESENTENCE REPORT

A. Factual Findings

The United States adopts the facts set forth in the Presentence Investigation Report submitted by the United States Probation Office on September 16, 2009.

B. Calculation of the Sentencing Guidelines Range

The United States adopts the offense level computations, the criminal history score, and the resulting Sentencing Guidelines range set forth in the Presentence Investigation Report.

IV. MOTIONS, APPLICATIONS AND REQUESTS OF THE UNITED STATES

A. Motion for Additional Reduction for Acceptance of Responsibility

Pursuant to U.S.S.G. § 3E1.1(b), the United States moves for an additional (third) offense level reduction for "acceptance of responsibility." The Defendant timely notified the authorities of his intention to plead guilty, thereby permitting the U.S. Attorney's Office to avoid preparing for trial and permitting the government and the Court to allocate their resources efficiently.

B. Ex Parte Communications With The Court

The United States respectfully requests that the Court provide the parties with any ex parte communications received by the Court in connection with the sentencing in this case, with the exception of the confidential sentencing recommendations submitted by the United States Probation Office.

C. Payment of Financial Obligations & Restitution

We respectfully request that the Court order payment, in full, of the special assessment, and any fine imposed. Given the information in the Presentence Investigation Report regarding the Defendant's financial condition, we agree with the Probation Office that the Defendant is not in a position to pay any such financial obligations immediately.

V. GOVERNMENT'S RECOMMENDATION WITHIN GUIDELINES RANGE

The government respectfully contends that a sentence of between 120 and 137 months (which is within the guideline range) would be "sufficient, but not greater than necessary," to comply with the sentencing purposes in 18 U.S.C. § 3553(a)(2). The defendant's conduct in this case follows five prior convictions for drug-related crimes. As set forth in the Plea Agreement, the defendant participated in a significant artifice whereby he sought to have, on two occasions, over 500 grams of cocaine transported from California to Catskill, New York, where he had arranged for an acquaintance to accept delivery using a fictitious name. FARROW successfully acquired the first 500 gram packages of cocaine and was successful in redistributing its content to others; FARROW was arrested shortly after receiving the second package. The defendant's conduct in this case, coupled with his prior convictions, establishes a longstanding and dangerous pattern of his callous disregard for federal and state drug laws. Given the extraordinary short interval between the conduct at issue in this case and the defendant's guilty plea to a Class B felony in New York County Supreme Court in November 2008, it appears that the defendant has not been deterred by his prior involvement in the criminal justice system from committing drug felonies. The United States submits that the only way to appropriately account for the Section 3553(a) factors is to impose the significant sentence of incarceration contemplated by the sentencing guidelines (120 to 137 months) which is also commensurate with the 120 month mandatory minimum that applies in this case.

"[I]n the ordinary case, the Commission's recommendation of a sentencing range will 'reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives.'" *Kimbrough v. United States*,128 S. Ct. 558, 574 (2007); *see United States v. Fernandez*, 443 F.3d 19, 27 (2d Cir. 2006) ("in the overwhelming majority of cases, a Guidelines sentence will fall comfortably within the broad range of sentences that would be reasonable in the particular circumstances.") Indeed, the Supreme Court has held that, on appeal, a within-Guidelines sentence may be presumed to be reasonable. *Rita v. United*

States, 127 S. Ct. 2456 (2007). This is because "the sentencing statutes envision both the sentencing judge and the [Sentencing] Commission as carrying out the same basic § 3553(a) objectives." *Rita*, 127 S. Ct. at 2463. "An individual judge who imposes a sentence within the range recommended by the Guidelines thus makes a decision that is fully consistent with the Commission's judgment in general." *Id*. at 2465. Further, within-Guidelines sentences promote Congress's goal in enacting the Sentencing Reform Act -- "to diminish unwarranted sentencing disparity." *Rita*, 127 S. Ct. at 2467.

The Supreme Court has recognized that "it is uncontroversial that a major departure should be supported by a more significant justification than a minor one." *Gall v. United States*, 128 S. Ct. 586, 597 (2007). If the court decides to impose a non-Guidelines sentence, the court "must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance." *Id.*

Although a sentencing court may vary from a Guideline range based on a policy disagreement with the Guidelines, such a deviation is not entitled to the same deference as a fact-based deviation.

> [A] decision to vary from the advisory Guidelines may attract greatest respect when the sentencing judge finds a particular case "outside the 'heartland' to which the Commission intends individual Guidelines to apply." (citation omitted). On the other hand, while the Guidelines are no longer binding, closer review may be in order when the sentencing judge varies from the Guidelines based solely on the judge's view that the Guidelines range "fails to properly reflect § 3553(a) considerations" even in a mine-run case.

Kimbrough, 128 S. Ct. at 574-75 (citations omitted). A non-Guidelines sentence "that rests primarily upon factors that are not unique or personal to a particular defendant, but instead reflects attributes common to all defendants" is "inherently suspect." *Rattoballi*, 452 F.3d at 133 (reliance on "indignity and ill-repute associated with criminal conviction," common to all convicted felons, is contrary to § 3553(a)(6), "which calls for a reduction in unwarranted disparities among similarly situated defendants").

Morever, the Second Circuit has held that a sentencing court cannot "import [its] own philosophy of sentencing if it is inconsistent with the § 3553(a) factors." *Rattoballi*, 452 F.3d at 132 (internal quotation marks and citation omitted). A sentence may be unreasonable if the court "relies on factors incompatible with the Commission's policy statements . . . in the absence of persuasive explanations as to why the sentence actually comports with the § 3553(a) factors." *Rattoballi*, 452 F.3d at 134, 135-36 (vacating a sentence of probation and home confinement as unreasonable when district court appeared to have overlooked or ignored policy statements that "make plain that imprisonment is generally warranted for antitrust offenders").

VI. PROCEDURAL REQUIREMENTS FOLLOWING *BOOKER*

A. Calculation of the Guidelines Range

The court "should begin all sentencing proceedings by correctly calculating the applicable guidelines range." *Gall*, 128 S. Ct. at 596 (2007). "An error in determining the applicable Guideline range . . . would be the type of procedural error that could render a sentence unreasonable under *Booker*." *United States v. Selioutsky*, 409 F.3d 114, 118 (2d Cir. 2005), *citing United States v. Rubenstein*, 403 F.3d 93, 98-99 (2d Cir.), *cert. denied*, 546 U.S. 876 (2005).

Prior to sentencing, the Court must resolve any material issues of fact, and must state its factual findings – by adoption of the Presentence Report or otherwise – on the record in a manner sufficient to permit appellate review. *See, e.g., United States v. Jeffers*, 329 F.3d 94, 101-02 (2d Cir. 2003); *United States v. Ben-Shimon*, 249 F.3d 98, 103 (2d Cir. 2001). The Court is authorized to make all factual determinations relating to the Sentencing Guidelines by a preponderance of the evidence, considering any reliable evidence, including hearsay. *See United States v. Gonzalez*, 407 F.3d 118, 125 (2d Cir. 2005) (the power of district judges to resolve disputed facts by a preponderance of the evidence at sentencing survives *Booker*); *United States v. Martinez*, 413 F.3d 239, 243 (2d Cir. 2005) (neither *Booker* nor *Crawford v. Washington*, 541 U.S. 36 (2004), bars judicial consideration of hearsay at sentencing), *cert. denied*, 546 U.S. 1117 (2006); *United States v. Crosby*, 397 F.3d 103, 112, 113 (2d Cir. 2005). "A sentencing judge would . . . violate [18 U.S.C. §] 3553(a) by limiting consideration of the applicable Guidelines range to the facts found by the jury or admitted by the defendant, instead of considering the applicable Guidelines range, as required by subsection 3553(a)(4), based on the facts found by the court." *Crosby*, 397 F.3d at 115.

B. Consideration of the Sentencing Guidelines and the § 3553(a) Factors

Although the Sentencing Guidelines are no longer mandatory, "*Booker* did not signal a return to wholly discretionary sentencing." *Rattoballi*, 452 F.3d at 132. The Second Circuit has cautioned:

> [I]t would be a mistake to think that, after *Booker/Fanfan*, district judges may return to the sentencing regime that existed before 1987 and exercise unfettered discretion to select any sentence within the applicable statutory maximum and minimum. On the contrary, the Supreme Court expects sentencing judges faithfully to discharge their statutory obligation to "consider" the Guidelines and all of the other factors listed in section 3553(a). We have every confidence that the judges of this Circuit will do so, and that the resulting sentences will continue to substantially reduce unwarranted disparities while now achieving somewhat more individualized justice.

Crosby, 397 F.3d at 113-114.

"As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark" for a sentence. *Gall*, 128 S. Ct. at 596. The Guidelines, which were fashioned after careful consideration of the other § 3553(a) factors, "cannot be called just another factor in the statutory list, 18 U.S.C. § 3553(a), because they are the only integration of the multiple factors and, with important exceptions, their calculations were based upon the actual sentences of many judges." *Rattobolli*, 452 F.3d at 133 (citations and internal quotation marks omitted); *Gall*, 128 S. Ct. at 594 (Guidelines are "the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions").

C. Statement of Reasons for the Sentence

Section 3553(c) requires the district court, "at the time of sentencing," to "state in open court the reasons for its imposition of the particular sentence." "[W]hen a judge decides simply to apply the Guidelines to a particular case, doing so will not necessarily require a lengthy explanation." *Rita*, 127 S. Ct. at 2469. Still, "[w]here a prosecutor or defendant presents non-frivolous reasons for imposing a different sentence, . . . the judge will normally . . . explain why he has rejected those arguments." *Id*.

Greater specificity is required for: (1) sentences within a Guidelines range that exceeds 24 months – for which the court must state "the reason for imposing a sentence at a particular point within the range" (18 U.S.C. § 3553(c)(1)); and (2) sentences outside the Guidelines range – for which the court must state orally and in the written judgment "the specific reason" for the imposition of the sentence (18 U.S.C. § 3553(c)(2)). *See, e.g.*, *United States v. Lewis*, 424 F.3d 239, 249 (2d Cir. 2005) (remanding because, in imposing a sentence for supervised release violation, the district court failed to state sufficient reasons for imposing a sentence outside the range recommended by Guidelines policy statements); *United States v. Goffi*, 446 F.3d 319, 321-22 (2d Cir. 2006) (remanding for the district court to amend the written judgment to state the specific reason for the imposition of a sentence outside of the policy statement for a probation violation).

When a sentence deviates significantly from the Guidelines, and the judge has not made a compelling statement of reasons, the Second Circuit "may be forced to vacate" if "the record is insufficient, on its own, to support the sentence as reasonable." *Rattoballi*, 452 F.3d at 135.

> Judicial decisions are reasoned decisions. Confidence in a judge's use of reason underlies the public's trust in the judicial institution. A public statement of those reasons helps provide the public with the assurance that creates that trust.

Rita, 127 S. Ct. 2468.

VII. GOVERNMENT'S POSITION REGARDING REMAND

Pursuant to the provisions of 18 U.S.C. § 3143(b), the United States respectfully moves the Court for an order directing remand of the Defendant immediately after sentence. The Defendant has long been aware of his impending sentencing, faces a significant term of imprisonment under the applicable Guidelines, and his attorney has not raised any substantial question of law or fact likely to form a viable basis for an appeal.

VIII. CONCLUSION

The United States respectfully contends that the recommended sentence of 120 to 137 months incarceration is the most appropriate sentence because it is "sufficient, but not greater than necessary" to achieve the goals of sentencing.

Dated: November 10, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that on November 10, 2009, the foregoing was electronically filed using the Court's CM/ECF system. Notice of this filing will be provided by the Court's CM/ECF system or by electronic mail to the following:

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